92-493

Supreme Court, U.S.
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NO.

In the Supreme Court of the United States

October Term, 1992

MARGARET LIPWORTH, as personal representative of the Estate of LORI LIPWORTH, a deceased minor, on behalf of the estate and the survivors of the decedent, to wit: MARGARET LIPWORTH, natural mother, and STEPHEN F. LIPWORTH, natural father,

Petitioner,

vs.

KAWASAKI MOTORS CORP. U.S.A., a foreign corporation, PALM BEACH KAWASAKI, INC., a Florida corporation, and KAWASAKI HEAVY INDUSTRIES, LTD., a foreign corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT.

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QUESTIONS PRESENTED FOR REVIEW

A.

WHETHER FLORIDA WRONGFUL DEATH OF A MINOR PRODUCT LIABILITY—NEGLIGENCE AND STRICT LIABILITY—CAUSES OF ACTION AGAINST THE SELLERS AND MANUFACTURERS OF A JET SKI AND ITS COMPONENT PARTS ARE PREEMPTED BY FEDERAL ADMIRALTY/MARITIME LAW WHERE THE JET SKI STRUCK A DOCK PROJECTING OUT INTO THE INTERCOASTAL WATERWAY WHICH ADMITTEDLY CONSTITUTES NAVIGABLE WATERS OF THE UNITED STATES.

B.

ASSUMING ARGUENDO SAID FLORIDA CAUSES OF ACTION ARE PREEMPTED BY FEDERAL ADMIRALTY/MARITIME LAW, WHETHER THE SURVIVING PARENTS OF THE DECEDENT HAVE AN ADMIRALTY/MARITIME CLAIM FOR LOSS OF COMFORT AND SOCIETY EVEN THOUGH NOT DEPENDENT UPON DECEDENT FOR SUPPORT.

In the decision sought to be reviewed the District Court of Appeal of Florida, Fourth District, answered Question A in the affirmative and Question B in the negative. (A. 1-5)[1]

[1]The symbol "A" shall stand for the material appended hereto.

LIST OF PARTIES

1. Petitioner, MARGARET LIPWORTH ("LIPWORTH"), is personal representative of the estate of Lori Lipworth, 11-year-old decedent ("DECEDENT"). LIPWORTH was wrongful death plaintiff in the trial court, appellant in the Florida District Court of Appeal, Fourth District, ("DISTRICT COURT"), and petitioner for issuance of writ of certiorari in the Florida Supreme Court ("FLORIDA SUPREME COURT").[2]

2. Respondent, KAWASAKI MOTORS CORP., U.S.A., a distributor of the subject jet ski, was defendant in the trial court, appellee in DISTRICT COURT and respondent in FLORIDA SUPREME COURT.

3. Respondent, PALM BEACH KAWASAKI, INC., a distributor of the subject jet ski, was defendant in the trial court, appellee in DISTRICT COURT and respondent in FLORIDA SUPREME COURT.

4. Respondent, KAWASAKI HEAVY INDUSTRIES, LTD., the manufacturer of the subject jet ski, was defendant in the trial court, appellee in DISTRICT COURT and respondent in FLORIDA SUPREME COURT.[3]

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[2]The provisions of the Florida Wrongful Death Act, Sections 768.16, et seq., Florida Statutes, mandate that the only permissible party plaintiff in a wrongful death action is the duly appointed personal representative of the estate. The personal representative must sue on behalf of the estate and the lawful survivors of the decedent—in this case LIPWORTH, individually, and Stephen F. Lipworth, DECEDENT'S natural father, individually.

[3]Respondents will be referred to herein in the collective singular as "KAWASAKI"

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OPINIONS BELOW

The pertinent opinions, decisions, orders and judgments below are:

1. The final judgment and opinion of the state trial court appealed and the trial court order regarding LIPWORTH'S amendment to third amended complaint referred to therein are not reported. They are found at A. 6-9.

2. The opinion/decision of DISTRICT COURT sought to be reviewed is reported at 592 So. 2d 1151. It is also found at A. 1-5.

3. The order of FLORIDA SUPREME COURT denying LIPWORTH'S petition for issuance of writ of certiorari to review the opinion/decision of DISTRICT COURT sought to be reviewed is not yet reported. A copy of same is found at A. 10.[4]

JURISDICTIONAL STATEMENT

On December 5, 1990, the trial court entered the final judgment appealed in this cause. (A. 6-7) LIPWORTH timely proceeded to DISTRICT COURT.

On February 20, 1992, DISTRICT COURT rendered the decision/opinion sought to be reviewed. (A. 1-5) LIPWORTH timely proceeded to FLORIDA SUPREME COURT.

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[4]To the effect that LIPWORTH had to proceed to the Supreme Court of Florida before filing a petition for writ of certiorari with this Court, please *see—THE FLORIDA STAR v. B.J.F.*, 530 So.2d 286 (Fla. 1988). (A. 11-14)

On June 30, 1992, FLORIDA SUPREME COURT entered an order denying LIPWORTH'S petition for issuance of writ of certiorari. (A. 10)

LIPWORTH invokes this Court's jurisdiction pursuant to the provisions of 28 U.S.C.A. 1257(3) under the time schedule contained in 28 U.S.C.A. 2101(c) and this Court's Rule 20. This petition was timely filed and no application for extension of time to file same was requested.

LIPWORTH contends that in the decision sought to be reviewed DISTRICT COURT decided important questions of federal law which have not been, but should be, settled by this Court, and/or decided federal questions in a way which conflicts with applicable decisions of this Court. See United States Supreme Court Rule 17,1(c).

STATUTES AND RULES INVOLVED

28 U.S.C.A. 1257(3), 28 U.S.C.A. 2101(c), 28 U.S.C.A. 1333, United States Supreme Court Rules 17 and 20, and Sections 768.16, et. seq., Florida Statutes, all *supra*.

STATEMENT OF CASE AND FACTS— SUBSTANTIAL QUESTIONS RAISED, DETERMINED AND DECIDED BY DISTRICT COURT

In the decision sought to be reviewed, DISTRICT COURT stated the pertinent undisputed facts of this case to be the following:

* * *

> "The surviving parents of their deceased eleven year old daughter, Lori, and the surviving mother, as personal representative of her late daughter's

estate, appeal a final judgment rendered by the trial court against them and in favor of the defendant. We affirm.

"Appellants filed a products liability suit against Palm Beach Kawasaki, Inc. for strict liability and against Kawasaki Motors Corporation and Kawasaki Heavy Industries, Ltd. for negligence and strict liability in the design, manufacture and sale of its JS 550A1 Jet Ski. On September 2, 1984, Lori collided with a dock while operating the jet ski in the intercoastal waterway [navigable waters of the United States] and died on impact. The third amended complaint sought damages in excess of one million dollars for medical and funeral expenses for Lori, for lost support and services for her parents, and for pain and suffering for her parents.

"After discovery, appellees filed two motions for partial summary judgment on the issue of damages, stating that federal maritime law controlled the case and under such law appellants were entitled to only medical and funeral expenses actually expended by them as a result of Lori's death.

"The trial court entered summary judgment, holding the case governed by federal maritime law and damages limited to medical and funeral expenses actually expended. Appellants moved the trial court to amend their third amended complaint to seek damages only for the loss of society, which the trial court granted. The amendment was the result of appellants' not wishing to proceed to trial to determine liability because they would recover no damages for funeral expenses, such claim being subject to a setoff received in settlement from

another defendant. The amendment of the ad damnum clause of the complaint enabled the trial court to enter an appealable final judgment which it did, resulting in the present appeal."

* * *

On appeal LIPWORTH raised the following points:

A.

WHETHER FLORIDA WRONGFUL DEATH OF A MINOR PRODUCT LIABILITY—NEGLIGENCE AND STRICT LIABILITY—CAUSES OF ACTION AGAINST THE SELLERS AND MANUFACTURERS OF A JET SKI AND ITS COMPONENT PARTS ARE PREEMPTED BY FEDERAL ADMIRALTY/MARITIME LAW WHERE THE JET SKI STRUCK A DOCK PROJECTING OUT INTO THE INTERCOASTAL WATERWAY WHICH ADMITTEDLY CONSTITUTES NAVIGABLE WATERS OF THE UNITED STATES.

B.

ASSUMING ARGUENDO SAID FLORIDA CAUSES OF ACTION ARE PREEMPTED BY FEDERAL ADMIRALTY/MARITIME LAW, WHETHER THE SURVIVING PARENTS OF THE DECEDENT HAVE AN ADMIRALTY/MARITIME CLAIM FOR LOSS OF COMFORT AND SOCIETY EVEN THOUGH NOT DEPENDENT UPON DECEDENT FOR SUPPORT.

In the decision sought to be reviewed DISTRICT COURT answered Question A in the affirmative and Question B in the negative.

REASONS FOR GRANTING THE WRIT

For the following reasons this Court should grant the writ and relief requested by LIPWORTH:

1. In the decision sought to be reviewed DISTRICT COURT decided important questions of federal law which have not been, but should be, settled by this Court, and/or decided federal questions in a way which conflicts with applicable decisions of this Court.

2. This case raises two questions of great public interest which impact on each and every case involving state wrongful death and product liability claims of a private party in the pleasure craft context where an accident occurs on navigable waters of the United States.

3. This case involves issues which cry out for an opinion which will give guidance to lower courts in both the federal and state court systems.

4. Should the Court reject the arguments advanced by LIPWORTH in support of the first issue raised, it would make it even more critical that this Court take jurisdiction of the cause and decide the second issue raised. This is true because of the absolutely unconscionable result reached by the application of the law made by DISTRICT COURT in the case at Bar, to wit: in a case involving the wrongful death of an 11-year-old child to deprive the surviving parents of any claim for loss of comfort and society and/or mental anguish and permit them to recover only medical and funeral expenses.

SUMMARY OF ARGUMENT

In her Question A argument LIPWORTH contends:

1. This is a garden variety product liability/negligence/strict liability/wrongful death action which is controlled by Florida law. It has nothing at all to do with traditional maritime activity. It is not in any way based upon a claim of unseaworthiness or negligent operation of a vessel. This is not a Jones Act or Longshoreman and Harbor Workers' Act case.[5]

2. *MORAGNE v. STATE MARINE LINES, INC.*, 399 U.S. 375, 90 S.Ct. 1772, 26 L.Ed. 2d 339 (1970) did not create a general admiralty/maritime law wrongful death remedy which preempts or displaces Florida wrongful death product liability and negligence law in this factual context. This is not a case governed by federal admiralty/maritime jurisdiction. LIPWORTH'S remedy is that which she seeks, to wit—a product liability/negligence/strict liability/wrongful death action governed by Florida law.

3. In any event this case is not governed by federal MORAGNE admiralty/maritime law because the involved jet ski is not a "vessel" as contemplated by federal admiralty/maritime law in this factual context.

4. Assuming arguendo that the subject jet ski is a "vessel" as contemplated by federal MORAGNE admiralty/maritime law—this case is still not governed by federal admiralty/maritime law because the causes of action asserted by LIPWORTH do not bear a substantial relationship to traditional admiralty/maritime activity. The causes of action asserted here are Florida negligence and strict liability wrongful death causes of action against the

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[5]These acts are akin to workers' compensation legislation with the quid pro quo of recovery being limitation of the amount of recovery.

designer and distributors of the jet ski. Therefore, LIPWORTH'S remedy is that which she seeks, to wit—a product liability/negligence/strict liability/wrongful death action governed by Florida law.

5. Assuming arguendo that federal admiralty/ maritime law does control here, LIPWORTH'S state law remedies co-exist on facts such as those involved here with her federal admiralty/maritime law remedies. This conclusion is demanded by the "saving to suitors clause" of the Federal Judicial Act, and controlling federal case law. Florida law does not conflict with federal admiralty/ maritime law in this context. Indeed, Florida law should, in this context, be held to supplement federal admiralty/ maritime law.

Under her Question B argument LIPWORTH contends:

1. For the reasons stated under this heading, *supra*, in numbered paragraph 5, LIPWORTH'S state law remedies co-exist on facts such as those involved here with her federal admiralty/maritime law remedies.

2. Assuming arguendo that her state law remedies do not co-exist with her federal admiralty/maritime law remedies, she is, at the very least, allowed to claim the federal admiralty/maritime law remedy of loss of comfort and society on behalf of Mr. and Mrs. Lipworth, DECEDENT'S surviving parents.

QUESTION A ARGUMENT

FLORIDA WRONGFUL DEATH OF A MINOR PRODUCT LIABILITY—NEGLIGENCE AND STRICT LIABILITY—CAUSES OF ACTION AGAINST THE SELLERS AND MANUFACTURERS OF A JET SKI AND ITS COMPONENT PARTS ARE NOT PREEMPTED BY FEDERAL ADMIRALTY/MARITIME LAW WHERE THE JET SKI STRUCK A DOCK PROJECTING OUT INTO THE INTERCOASTAL WATERWAY WHICH ADMITTEDLY CONSTITUTES NAVIGABLE WATERS OF THE UNITED STATES.

A.

PREFACE

There are two bright lines of admiralty/maritime authority involved here *which should not be mixed and matched.*[6] They will be referred to herein as the "SURVIVOR BENEFIT LINE" and "SHIPOWNER PROTECTIVE LINE."

The SURVIVOR BENEFIT LINE of cases are designed to provide causes of action where none previously existed or existing causes were severely strictured for survivors of decedents who died within state boundaries. *The whole idea behind these cases is to benefit claimants. These are the cases which should be applied to answer the questions presented in the case at Bar.*

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[6]All emphasis appearing in this brief is supplied by counsel unless otherwise noted.

The SHIPOWNER PROTECTIVE LINE of cases are designed to protect owners of vessels dealing in traditional maritime activity. *These cases are inapposite here.*

B.

FLORIDA PRODUCT LIABILITY AND NEGLIGENCE LAW NOT PREEMPTED BY MORAGNE.

MORAGNE v. STATE MARINE LINES, INC., 399 U.S. 375, 90 S.Ct. 1772, 26 L. Ed. 2d 339 (1970) is the SURVIVOR BENEFIT LINE seminal case. MORAGNE was an action commenced in a Florida state court. The plaintiff alleged both negligence and unseaworthiness and sought to recover damages from a ship owner for the death of her husband which occurred while he was working as a longshoreman aboard a vessel on navigable waters within the boundaries of the State of Florida. The case was ultimately removed to the federal court system and the Federal District court dismissed the unseaworthiness claims on grounds that there was no federal cause of action for death in unseaworthiness cases. Upon certification from the United States Court of Appeals for the Fifth Circuit, the Supreme Court of Florida held similarly that the Florida wrongful death statute *did not* allow a cause of action for death predicated on unseaworthiness. The federal appellate court then affirmed the District Court's order and rejected plaintiff's contention that she was entitled to relief under federal maritime law. *Thus, the survivor claimant was left without a remedy*! On certiorari this Court reversed the decision of the Circuit Court of Appeals. This Court held that an action did lie under general admiralty/maritime law for death caused by violation of admiralty/maritime duties *so as to permit the plaintiff to assert wrongful death claims based on unseaworthiness. Indeed this Court created a remedy! A careful reading of the MORAGNE decision indicates that this Court desired to benefit potential*

claimants rather than leave them without a remedy. The decision was not ever intended to stricture the state rights of potential, wrongful death claimants or to leave them without a remedy.

Although not directly in point here, this Court's decision in *OFFSHORE LOGISTICS, INC. v. TALLENTIRE*, 47 U.S. 207, 106 S.Ct. 2485, 91 L.Ed. 2d 174 (1986), is highly instructive and persuasive. TALLENTIRE was an action by the survivors of two men who worked on a drilling platform in the Gulf of Mexico off the coast of Louisiana. They were killed when the helicopter transporting them from the platform to the Louisiana shore crashed about 35 miles off the coast. The wives of the deceased workers filed wrongful death actions in the United States District court for the Eastern District of Louisiana. The District Court held that since the accident occurred more than one marine league (3 miles from shore), the Death on the High Seas Act ("DOHSA") applied and the borrowing provision of OCSLA [the United States Outer Continental Shelf Act] which would adopt the law of the adjacent state, Louisiana, as surrogate federal law, did not apply to the case. Clearly implicit in the TALLENTIRE decision is the conclusion that had the involved accident occurred within one marine league off the coast of Louisiana, the OCSLA borrowing provisions would have been applicable, Louisiana law would have applied. *The survivors would have been entitled to damages for non-pecuniary losses, including mental anguish. Indeed, the savings to suitors provision of the United States Constitution would require such a result.*

In TALLENTIRE, this Court, inter alia, stated:

* * *

"[lc, 5] As explained above, DOHSA is intended to provide a maritime remedy for deaths stemming

from wrongful acts or omissions 'occurring in the high seas.' 46 U.S.C. Section 761 [46 U.S.C.A. Section 761]. OCSLA, by contrast, provides an essentially non-maritime remedy and controls only on 'the subsoil and seabed of the Outer Continental Shelf, and artificial islands and fixed structures' erected thereon. 43 U.S.C. Section 1333(a)(1)(A) [43 U.S.C.S. Section 1333(a)(2)(A)]. By its terms, OCSLA must be 'construed in such a manner that the character of the waters above the Outer Continental Shelf as high seas . . . shall not be affected.' Section 1331(2). Within the area covered by OCSLA, federal law controls but the law of the adjacent state if adopted as surrogate federal law to the extent that it is not inconsistent with applicable federal laws or regulations. Section 1333(a)(2)(A).

"The intent behind OCSLA was to treat the artificial structures covered by the Act as upland islands or as federal enclaves within a landlocked state, and not as vessels, for purposes of defining the applicable law *because maritime law was deemed inapposite to these fixed structures. See Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 361-366, 23 L.Ed. 2d 360, 89 S.Ct. 1835 (1969). This Court endorsed the congressional assumption that admiralty law generally would not apply to the lands and structures covered by OCSLA in Rodrigue, noting that accidents on the artificial islands covered by OCSLA *'had no more connection with the ordinary stuff of admiralty than do accidents on piers.' Id.* at 360, 23 L.Ed. 2d 360, 89 S.Ct. 1835. *See* also *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 422, 84 L.Ed. 2d 406, 105 S.Ct. 1421 (1985). Thus, in Rodrigue, the Court held that an admiralty action under DOHSA does not apply to accidents 'actually occurring' on these artificial

islands, and that DOHSA therefore does not preclude the application of state law as adopted federal law through OCSLA to wrongful death actions arising from accidents."

* * *

In *FORD v. WOOTEN*, 681 F. 2d 712 (11 Cir. 1982), *cert. den.*, 459 U.S. 1202, 103 S.Ct. 1187, 75 L.Ed. 2d 433 (1983), the United States Court of Appeals for the 11th Circuit correctly pointed out that this Court in MORAGNE concluded by specifically holding:

* * *

"We accordingly overrule The Harrisburg, and hold that an action does lie under general maritime law *for death caused by violation of maritime duties*. The judgment of the court of appeals is reversed, and the case is remanded to that court for further proceedings consistent with this opinion." (MORAGNE at 26 L. Ed. 2d 361)

* * *

In FORD the 11th Circuit Court of Appeals stated:

* * *

"Even if we assume that the District Court did conclude as a matter of law that general maritime law permits a recovery for wrongful death only on the basis of unseaworthiness, we do not believe that conclusion to be erroneous. Moragne . . . first established a cause of action under general maritime law for wrongful death due to a breach of maritime duties. In that case, plaintiff had made

> claims under both negligence and unseaworthiness theories but the trial court dismissed the unseaworthiness claim. *Thus the Supreme Court's opinion which mentioned unseaworthiness but never expressly discussed negligence, pertained only to an unseaworthiness claim. Moreover subsequent Supreme Court cases have indicated that Moragne applied the wrongful death remedy only where death resulted from unseaworthiness. See e.g., Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 574, 94 S.Ct. 806, 809, 89 L. Ed. 2d 9 (1974)."

* * *

In the case at Bar LIPWORTH does not and could not assert an "unseaworthiness" claim. It must be emphasized that under federal admiralty/maritime law the word "unseaworthiness" *is one of art referring to actions prosecuted under the Longshoreman's Act and Jones Act.* Accord—*IVY v. SECURITY BARGE LINES, INC.*, 606 F. 2d 524 (5 Cir. 1979) *(en banc), cert. den.*, 446 U.S. 956, 100 S.Ct. 2927, 64 L.Ed. 2d 815 (1980); *NELSON v. UNITED STATES*, 639 F. 2d 469 (9 Cir. 1980); *see* also *MOBIL OIL CORP. v. HIGGENBOTHAM*, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed. 2d 581 (1978).

It is thus seen that the MORAGNE doctrine was designed to benefit, not punish, potential claimants. It certainly cannot form the predicate to support the rulings made by the trial court and DISTRICT COURT in this case. LIPWORTH'S cause of action should be governed by Florida law. Florida law permits the recovery of the damages demanded by LIPWORTH in her third amended complaint. DISTRICT COURT here—following the lead of some Florida and federal courts—mixed and matched the two bright lines of authority and came up with an outrageous

result completely out of sync with this Court's thought and intention.

C.

A JET SKI IS NOT A "VESSEL" IN CONTEMPLATION OF EXCLUSIVE APPLICATION OF FEDERAL ADMIRALTY/MARITIME LAW TO THE CASE AT BAR.

The subject jet ski is a form of water-going sled, intended to be operated by a single person while in a standing position by means of a handlebar-like mechanism which controls the direction of travel as well as the acceleration in speed of the machine. Propulsion of the machine is attained by a water jet propulsion pump powered by a gasoline powered inboard engine. Admittedly, the Eleventh Circuit Court of Appeals has held that a jet ski is a "vessel" for purposes of resolving *Federal Admiralty Limitation of Liability* questions. *See IN THE MATTER OF COMPLAINT OF KEYS JET SKI, INC.*, 893 F. 2d 1225 (11 Cir. 1990). However, that holding—questionable though it is even in that context—would not apply or be persuasive here. *It is a SHIPOWNER PROTECTIVE LINE case. It would apply to the owners of the jet ski. It would not apply to KAWASAKI.* Indeed, the KEYS JET SKI decision is a clear example of the mixing and matching referred to herein, *supra.*

D.

NO SUBSTANTIAL RELATIONSHIP BETWEEN CASE AT BAR AND TRADITIONAL MARITIME ACTIVITY IN ANY EVENT.

The following principles and cases are deserving of consideration at this juncture:

1. The original traditional test for the conferral of admiralty/maritime jurisdiction in a tort case was the "locality" rule. Simply stated, under that Rule, if a tort of any kind, however occurring, whether on board a vessel or not, if upon the high seas or navigable waters was cognizable in admiralty/maritime jurisdiction. Under that rule for years this Court extended admiralty jurisdiction to cases involving any connection with navigable waters.

2. The rule was criticized to the extreme by the lower federal courts and admiralty scholars as being far too harsh and oppressive to tort and wrongful death claimants.

3. In the face of this criticism this Court *adopted a maritime nexus requirement* for the invocation of admiralty jurisdiction in tort cases. *This to benefit potential claimants who did not want to be—or should not have been forced to be—subjected to federal admiralty/maritime jurisdiction.* This Court held that in order to invoke admiralty jurisdiction the new test was vessel *plus* locality *plus "traditional maritime activity." EXECUTIVE JET AVIATION, INC. v. CITY OF CLEVELAND*, 409 U.S. 249, 34 L.Ed. 454, 93 S.Ct. 493 (1972). In EXECUTIVE JET this Court refused to extend admiralty/maritime jurisdiction to a claim arising from a plane crash in Lake Erie. The Court declared:

* * *

> "We conclude that the mere fact that the alleged wrong 'occurs' or 'is located' on or over navigable waters . . . is not of itself sufficient to turn an airplane negligence case into a 'maritime tort.' *It is far more consistent with the history and purpose of admiralty to require also that the wrong bear a significant relationship to traditional maritime activity.*"

* * *

Although the EXECUTIVE JET holding was designed to govern an aircrash case, this Court's inclusion of a traditional maritime activity nexus requirement in its opinion led a number of courts to adopt this test as the general standard for determining the existence, vel non, of admiralty/maritime jurisdiction.

4. In 1982 this Court squarely addressed the issue of whether pleasure boat accidents met the vessel *plus* locality *plus* traditional maritime activity requirement. *See FOREMOST INSURANCE CO. v. RICHARDSON*, 457 U.S. 688, 102 S.Ct. 2654, 73 L.Ed. 2d 300 (1982), *a distinctly SURVIVOR BENEFIT LINE case.* In FOREMOST—*which involved a collision between two pleasure boats*—this Court held that having passed the trifold test, admiralty jurisdiction would apply to pleasure boat accidents. *However, this Court, in footnote 5, tempered its holding by stating:*

* * *

> "Not every accident in navigable waters that might disrupt maritime commerce will support federal admiralty jurisdiction . . . . However, when this kind of potential hazard to maritime commerce *arises out of activity that bears a substantial relationship to traditional maritime activity, as does the navigation of boats in this case, admiralty jurisdiction is appropriate.*"

* * *

5. *In SOUTHER v. THOMPSON*, 754 F. 2d 151 (4 Cir. 1985), *the Circuit Court refused to extend admiralty jurisdiction to a suit brought by an injured water skier*

predicated upon the plaintiff's failure to make any factual allegation that the operator of the boat had violated a navigational rule. Again, in *HOGAN v. OVERMAN*, 767 F. 2d 1093 (4 Cir.1985), the Circuit Court relied upon the navigational error allegation test to determine existence, vel non, of admiralty/maritime jurisdiction.

Here, assuming arguendo that the jet ski was a "vessel" as contemplated by federal admiralty law, this case is still not governed by federal admiralty law because the causes of action asserted by LIPWORTH *do not bear a substantial relationship to traditional maritime activity specifically including the navigation of a "vessel."* The causes of action asserted here are state wrongful death negligence and strict liability causes of action against the designer, manufacturer and distributors of the jet ski. *LIPWORTH does not allege that negligent navigation was the cause of injury. There simply is no relationship between this incident and action and traditional maritime activity.* Therefore, LIPWORTH'S cause of action should be governed by Florida law. Florida law permits the recovery of the damages demanded by LIPWORTH in her third amended complaint.

E.

THE SAVING TO SUITORS CLAUSE— LIPWORTH'S STATE COURT RIGHTS CO-EXIST WITH HER ADMIRALTY/MARITIME LAW RIGHTS.

The existence of federal admiralty/maritime jurisdiction is predicated primarily upon the provisions of Title 28, U.S. Code Section 1333, which, in pertinent part, provides:

* * *

"Section 1333. Admiralty, maritime and prize cases

"The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

"(1) Any civil case of admiralty or maritime jurisdiction, *saving to suitors in all cases all other remedies to which they are otherwise entitled.*"

* * *

It must be emphasized that the following are established federal admiralty/maritime law principles:

1. General principles of negligence control the analysis of an admiralty/maritime tort case.

2. Even though admiralty/maritime actions are governed by federal substantive law, courts applying admiralty/maritime law, including federal or state courts, may adopt state law by express or implied reference where state law does not conflict with federal law, or by virtue of the interstitial nature of federal law.

3. State law may supplement admiralty/maritime law where admiralty/maritime law is silent on a given subject or, under certain circumstances, where a local matter is at issue.

See for example—*OFFSHORE LOGISTICS, INC. v. TALLENTIRE, supra; COASTAL IRON WORKS, INC. v. PETTY RAY GEOPHYSICAL*, 783 F. 2d 577 (5 Cir. 1986); *CASACELI v. MARTECH INTERN., INC.*, 774 F.2d 1322

(5 Cir. 1985); *SULLIVAN v. ROWEN COMPANIES, INC.*, 736 F. Supp. 722 (E.D. La. 1990); and numerous authorities cited therein.

In *OFFSHORE LOGISTICS, INC. v. TALLENTIRE, supra*, this Court stated that "states could modify" or "supplement" the federal maritime/admiralty law by providing a wrongful death remedy enforceable in admiralty for accidents in territorial waters. Accord *WESTERN FUEL CO. v. GARCIA*, 257 U.S. 233, 42 S.Ct. 89, 66 L.Ed. 210 (1921); and *MADRUGA v. SUPERIOR COURT*, 346 U.S. 556, 74 S.Ct. 298, 98 L.Ed. 290 (1954).

In sum, if the "savings to suitors" clause means anything at all, this Court must quash the decision sought to be reviewed and write an opinion upholding LIPWORTH'S right to assert her state court wrongful death, product liability and negligence claims here and to seek the state court wrongful death damages sought here.

QUESTION B ARGUMENT

ASSUMING ARGUENDO SAID FLORIDA CAUSES OF ACTION ARE PREEMPTED BY FEDERAL ADMIRALTY/MARITIME LAW, THE SURVIVING PARENTS OF THE DECEDENT HAVE AN ADMIRALTY/MARITIME CLAIM FOR LOSS OF COMFORT AND SOCIETY EVEN THOUGH NOT DEPENDENT UPON DECEDENT FOR SUPPORT.

This argument is made assuming arguendo this Court should reject LIPWORTH'S Point I argument and, in particular, the argument that her state law and admiralty/maritime law remedies co-exist.

It must be emphasized that the case at Bar is a state court product liability/negligence/wrongful death action against the manufacturer of the jet ski. LIPWORTH does not seek any form of federal remedy. This is *not* an action for death on the high seas. This is *not* an action by a seaman under any federal statute. This is *not* an action by a longshoreman under any federal statute. This is *not* an action against the owner or operator of a vessel engaged in traditional maritime activity.

Actions not involving seamen arising on territorial waters of a state were traditionally governed by the state's wrongful death statute until this Court judicially created a "general maritime" remedy in MORAGNE. However, the parameters of the general maritime cause of action and the damages which might be awarded were not defined by this Court in MORAGNE. Rather, the Court held that the exact parameters of this new cause of action "could be defined only after further litigation." The question of whether or not the federal admiralty/maritime damage item of loss of comfort and society is available in a case such as this is unsettled. It must again be emphasized *that MORAGNE was intended to benefit claimants and broaden the scope of remedies available to them under federal admiralty/ maritime law and not to deprive them of remedies.*

In *PALMER v. RIBAX*, 407 F. Supp. 974 (M.D. Fla. 1976) the court held that the parents of a child killed in the territorial waters of Florida had a cause of action which would include the damage item of loss of society under general maritime law. *The court recognized that the MORAGNE general maritime remedy was designed to afford remedies to injured claimants comparable to those available under state law.* Noting that Florida's wrongful death act allowed financially non-dependent parents to recover for mental pain and suffering caused by the wrongful death of a child, the court found that the general maritime

remedy available to them under federal law ought to include loss of comfort and society.

In *THOMPSON v. OFFSHORE CO.*, 440 F. Supp. 752 (S.D. Tex. 1977), the court awarded a non-dependent child damages for the loss of her father's comfort and society even though the child was married, did not live with the decedent at the time of death and was not financially dependent on her father. The Texas court flatly rejected the idea that in cases such as this, such damages would not be available, *inter alia*, stating:

* * *

> "Dependents . . . contend that financial dependency should be a prerequisite to recovery under the general maritime law for a non-pecuniary loss of society. Decisions in this circuit subsequent to Moragne and Gaudet have rejected such a restrictive application of the general maritime remedy and have recognized the standing of children, spouses and parents of a decedent to recover for a loss of society. *See Skidmore v. Grueninger*, 506 F. 2d 716, 729 n. 11 (5th cir. 1975) (adult daughter) decision on remand, (Memorandum Opinion on Remand, C.A. No. 70-1015, Section D) (E.D. La., December 10, 1875); *Herbert v. Otto Candies, Inc.*, 402 F. Supp. 503, 507 (E.D. La. 1975) (spouse and children); *Hamilton v. Canal Barge Co.*, 395 F. Supp.975, 985 (E.D. La. 1975) (parents); cf. The Complaint of Cambria Steamship Co., 505 F. 2d 517, 524-25 (6th Cir. 1974), *cert. denied*, 420 U.s. 975, 95 S.Ct.1399, 43 L.Ed. 2d 6555 (1975). These courts properly have looked to the Jones Act, DOHSA and state wrongful death acts for guidance in defining those survivors who may invoke the general maritime law.

Moreover, because a loss of society is not a financial loss, it would be inappropriate to conclusively presume that only those family members financially dependent on the decedent have suffered such loss. Accordingly, a financial dependency need not be shown by these immediate family members in order to recover for loss of society under the general maritime law."

* * *

The THOMPSON court recognized that loss of society damages are not recoverable under the Jones Act or DOHSA for either dependents or non-dependents because it represents a non-pecuniary loss, but held this damage item recoverable under general maritime law. The federal statutory causes of action afforded seamen and longshoremen under DOHSA and the Jones Act were enacted to provide special solicitude for the welfare of those men who undertake upon hazardous and non-predictable sea voyages. These statutory causes of action were designed to create a cause of action where one was previously not available. They were not designed to deprive litigants of actions which were traditionally available in the courts of the states. *See* again *OFFSHORE LOGISTICS, INC. v. TALLENTIRE, supra; see* also *McDONALD v. FEDERAL BARGE LINES*, 496 F. 2d 1376 (5th Cir. 1974). The court in THOMPSON listed the criteria to be considered in determining those who are entitled to recovery for loss of society under general maritime law. They are:

1. The relationship of husband and wife, or of parents and child;

2. Continuous living together of parties at or prior to time of wrongful death;

3. Absence of deceased or beneficiary for extended period of time;

4. Harmonious marital or family relationships;

5. Common interest in hobbies, scholarship, or, religion or social activities;

6. Participation of deceased in family activities;

7. Disposition and habit of deceased to tender aid, solace and comfort when required; and

8. Ability and habit of deceased to render advice and assistance of financial matters, business activities and the like.

In sum then, for the reasons stated herein, *supra*:

1. LIPWORTH'S state law remedies co-exist on facts such as those involved here with her federal admiralty/ maritime law remedies. She is entitled, therefore, to Florida wrongful death damages including mental anguish damages.

2. Assuming arguendo that this Court should hold her state law remedies are preempted by and do not co-exist with her federal admiralty/maritime law remedies, she is, at the very least, entitled to claim the federal admiralty/ maritime law remedy of loss of comfort and society on behalf of herself and her husband, individually, as DECEDENT'S surviving parents.

CONCLUSION

It is respectfully submitted that for the reasons stated herein, this Court should take jurisdiction of the within cause and quash the decision rendered by DISTRICT COURT and remand the cause with directions to DISTRICT COURT to reinstate LIPWORTH'S Florida causes of action for product liability—strict liability and negligence—wrongful death damages against KAWASAKI and allow her to amend to seek the federal admiralty/maritime law damage items of lost comfort and society as well. At the very least, the DISTRICT COURT opinion must be quashed and the cause remanded with directions to permit LIPWORTH to claim loss of comfort and society as general admiralty/maritime damages items.

Respectfully submitted,

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and
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Attorneys for Petitioner

By: /s/ EDWARD A. PERSE
Edward A. Perse

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing Petition was mailed to the following counsel of record this 17th day of September, 1992.

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2900 One Mercantile Center
St. Louis, Missouri 63101

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Edward A. Perse

Appendix

INDEX TO APPENDIX

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The opinion/decision sought to be reviewed — LIPWORTH v. KAWASAKI MOTORS CORP. U.S.A. et al, rendered January 8, 1992..... A. 1

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Order of Florida Supreme Court Denying Direct Conflict Certiorari ..... A. 15

MARGARET LIPWORTH, as Personal Representative of the Estate of Lori Lipworth, a Deceased Minor, on Behalf of the Estate and the Survivors of the Decedent, to Wit: Margaret Lipworth, Natural Mother, and Stephen F. Lipworth, Natural Father, Appellants,

v.

KAWASAKI MOTORS CORP. U.S.A., a foreign corporation, Palm Beach Kawasaki, Inc., a Florida corporation, and Kawasaki Heavy Industries, Ltd. a foreign corporation, Appellees.

No. 90-3473.

District Court of Appeal of Florida,
Fourth District.

Jan. 8, 1992.

Motion to Certify Question Denied
Rehearing En Banc Denied
Feb. 20, 1992.

Surviving parents of deceased 11-year-old girl, and the surviving mother, as personal representative of her daughter's estate, filed products liability suit against jet ski manufacturer and other defendants seeking to recover damages arising from the death of their daughter. The Circuit Court, Palm Beach County, Richard B. Burk, J., entered judgment in favor of the defendants, and the plaintiffs appealed. The District Court of Appeal held that: (1) federal maritime law governed products liability suit against manufacturer of jet ski and other defendants to recover damages for fatal injury to decedent, who collided with dock while operating jet ski in intercoastal waterway, and (2) nondependent parents of decedent could not recover under general maritime law for loss of society.

Affirmed.

1. Admiralty —1.20(6)

Federal maritime law governed products liability suit against manufacturer of jet ski and other defendants to recover damages for fatal injury to decedent, who collided with dock while operating jet ski in intercoastal waterway. 28 U.S.C.A. § 1333.

2. Death —88

Nondependent parents of decedent, who was killed when she collided with dock while operating jet ski in intercoastal waterway, could not recover under general maritime law for loss of society.

Edward A. Perse, Perse, P.A. & Ginsberg, P.A., and Ratiner & Glinn, P.A., Miami, for appellants.

Richard A. Mueller, Coburn, Croft & Putzell, St. Louis, Mo., and Ronald E. D'Anna, Mattlin & McClosky, Boca Raton, for appellee Kawasaki Heavy Industries, Ltd.

James E. Tribble and Angela C. Flowers, Blackwell & Walker, P.A., Miami, for appellees Kawasaki Motors Corp., U.S.A., and Palm Beach Kawasaki, Inc.

PER CURIAM.

The surviving parents of their deceased eleven year old daughter, Lori, and the surviving mother, as personal representative of her late daughter's estate, appeal a final judgment rendered by the trial court against them and in favor of the defendants. We affirm.

Appellants filed a products liability suit against Palm Beach Kawasaki, Inc. for strict liability and against Kawasaki Motors Corporation and Kawasaki Heavy Industries, Ltd. for negligence and strict liability in the design, manufacture and sale of its JS 550A1 Jet Ski. On

September 2, 1984, Lori collided with a dock while operating the jet ski in the intercoastal waterway and died on impact. The third amended complaint sought damages in excess of one million dollars for medical and funeral expenses for Lori, for lost support and services for her parents, and for pain and suffering for her parents.

After discovery, appellees filed two motions for partial summary judgment on the issue of damages, stating that federal maritime law controlled the case and under such law appellants were entitled to only medical and funeral expenses actually expended by them as a result of Lori's death.

The trial court entered summary judgment, holding the case governed by federal maritime law and damages limited to medical and funeral expenses actually expended. Appellants moved the trial court to amend their third amended complaint to seek damages only for loss of society, which the trial court granted. The amendment was the result of appellants' not wishing to proceed to trial to determine liability because they would recover no damages for funeral expenses, such claim being subject to a setoff received in settlement from another defendant. The amendment of the ad damnum clause of the complaint enabled the trial court to enter an appealable final judgment which it did, resulting in the present appeal.

I.

[1] Appellants first attempt to take the instant case out of federal maritime jurisdiction on several grounds, none of which we find to be meritorious, notwithstanding the tragedy and its judicial consequences. The statutory basis for federal admiralty jurisdiction is 28 U.S.C.A. § 1333 which provides in relevant part:

> The district courts shall have original jurisdiction, exclusive of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in cases all other remedies to which they are otherwise entitled.

The courts have attempted to determine what admiralty or maritime jurisdiction means. The traditional or original test for the conferral of admiralty jurisdiction in a tort case was the locality of the wrong. A wrong was actionable in admiralty if it occurred on navigable waters. The Supreme Court has refined the test and added more prongs. In *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972), the Supreme Court held that admiralty jurisdiction did not extend to an airplane crash into navigable waters where the plane flew predominantly over land. Thus, the Court concluded that location on or over navigable waters was not of itself sufficient to turn an airplane negligence case into a maritime tort. The Court found it far more consistent with the history and purpose of admiralty to require also that the wrong bear a significant relationship to traditional maritime activity. Nexus and locality were necessary for admiralty jurisdiction to lie.

In *Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 102 S.Ct. 2654, 73 L.Ed.2d 300 (1982), the Court held the collision of two pleasure boats cognizable in admiralty because it implicated the traditional maritime concern of navigation and could possibly disrupt maritime activity. Hence, a maritime activity need not bear a substantial relationship to a commercial activity so long as it had a potential impact on maritime commerce.

In *Sisson v. Ruby*, ____ U.S. ____, 110 S.Ct. 2892, 111 L.Ed.2d 292 (1990), the Court reviewed its holdings in *Executive Jet* and *Foremost* and found admiralty jurisdiction in an action involving a fire on a noncommercial vessel at a marina on a navigable waterway. The yacht owner sought to limit his liability for the fire which caused extensive damage to the marina and several neighboring

boats. The Supreme Court reasoned that the jurisdictional inquiry did not turn on the actual effects on maritime commerce of the fire on the pleasure vessel but on the general features of the type of incident involved to determine whether such an incident is likely to disrupt commercial activity. Storage and maintenance of a vessel was considered a traditional maritime activity and the fire had a significant relationship to traditional maritime activity.

The Court declined to refine any further the test developed in *Executive Jet* and *Foremost*, finding the trilogy it had decided provided appropriate and sufficient guidance to the federal courts. Therefore, the relevant inquiry in the instant case involves three prongs: (1) locality, which is not an issue here as the collision occurred in the intercoastal waterway, navigable waters, (2) nexus, that the wrong bear a significant relationship to traditional maritime activity, and (3) potential impact of the type of incident on commercial maritime activity.

The issue of whether a jet ski is a vessel is a necessary preliminary step in an analysis of the facts of the instant case under the second prong. The Eleventh Circuit answered this question affirmatively in *Keys Jet Ski, Inc. v. Kays*, 893 F.2d 1225 (11th Cir. 1990). The Eleventh Circuit noted the definition of "vessel" as "every description of watercraft or artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C.A. § 3. It found no reasonable distinction between small motor boats capable of being used as a means of transportation on water and a jet ski, which is also capable of substantially equivalent transportation on water. *Kays*, 893 F.2d at 1230. Thus, the instant case involves a vessel.

Once it is determined that a jet ski is a vessel, it seems inevitable to us that the wrong involved in the instant case, the collision of a vessel with a dock, is related to traditional maritime activity. Operating a vessel is a traditional

maritime activity. Appellants would like this court to find no relationship between the incident in the instant case and traditional maritime activity, stating that they did not allege negligent navigation as the cause of the injury. However, *Foremost*, to which appellants cite, does not require such an allegation, but merely held that where navigation of pleasure boats was involved and an accident with the potential to disrupt maritime commerce occurred in navigable waters, admiralty jurisdiction was appropriate. The relevant activity is navigation of vessels generally and hence the nexus prong is met.

Turning from nexus to potential impact upon commercial maritime activity, it is important to remember that it is not the actual effects of the incident that must be assessed, but the general features of the type of incident involved, to determine whether such activity is likely to disrupt commercial activity. In *Foremost*, the court found the collision of two small pleasure boats was potentially disruptive even though the collision there occurred in an area seldom, if ever, used for commercial traffic. Thus, the potential for disruption of commercial maritime activity exists under the facts of the instant case, even if the area where Lori crashed into the dock is seldom used by commercial boats. The third prong is met.

The trial court in the instant case applied maritime law to the exclusion of Florida's wrongful death statute. Because the instant case is an admiralty case, as discussed above, federal maritime law governs. *Moragne v. State Marine Lines, Inc.*, 398 U.S. 375, 378 n. 1, 980 S.Ct. 1772, 1776 n. 1, 26 L.Ed.2d 339, 344 n. 1 (1970); *Ritchey v. Florida Power & Light*, 468 So.2d 306, 307 (Fla.2d DCA 1985).

We have considered appellants' other arguments and reject them without discussion.

II

[2] For their second point on appeal, appellants contend that, assuming arguendo that maritime law applies to the instant case, they have a damages claim for loss of society and the trial court erred in granting summary judgment for appellees on this count based on their lack of financial dependence on the decedent. The most recent Florida decision on point holds that parents may not recover under general maritime law for the death of a child absent a showing of financial dependence on the child. *Perlman v. Valdes*, 575 So.2d 216 (Fla.3d DCA 1990). We agree.

In *Perlman* a woman died when the speed boat in which she and her husband were riding struck an unlighted, unused concrete pier. Her parents joined in the husband's and estate's wrongful death action against the owner of the pier. The third district found that the trial court had properly granted summary judgment in the owner's favor on the parents' claim as the parents could not recover under general maritime law absent a showing of financial dependence. *Id.* at 218. The court cited *Miles v. Apex Marine Corp.*, ____ U.S. ____, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990) (non-dependent parent could not recover for loss of society of dead seaman under general maritime law wrongful death action). The third district denied parents of a nonseaman recovery denied parents of a seaman.

In *Texaco Refining & Marketing, Inc. v. Estate of Dau Van Tran*, 808 S.W.2d 61 (Tex.), *cert. denied*, ____ U.S. ____, 112 S.Ct. 301, 116 L.Ed.2d 245 (1991), a good samaritan stopped to help the elderly captain of a shrimp boat free his propeller. He was crushed against the dock when a wave washed ashore. Citing *Miles*, 111 S.Ct. at 326, the Texas Supreme Court held that loss of society is not recoverable under general maritime law. Thus, as did the

Florida Third District Court of Appeal, Texas applied the *Miles* holding to nonseamen.[1]

In *Sistrunk v. Circle Bar Drilling Co.*, 770 F.2d 455 (5th Cir.1985), *cert. denied*, 475 U.S. 1019, 106 S.Ct. 1205, 89 L.Ed.2d 318 (1986), the Fifth Circuit reversed the district court's judgment awarding nondependent parents of crew

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[1]The problem with denying recovery for loss of society to parents in analogous situations to appellants in the instant case was noted in *Palmer v. Ribax, Inc.*, 407 F.Supp. 974 (M.D.Fla. 1976). The court noted that if parents were denied standing as beneficiaries of the maritime claim, at least for purposes of recovering for loss of society, an irony would exist. *Id.* at 979. On the one hand, the parents' claim under state law is effectively destroyed and on the other hand, the parents are accorded no comparable maritime remedy. Thus, the nondependent parents in *Palmer* were entitled to bring a wrongful death action to recover for loss of society actually caused by the death of their eighteen year old child who fell off the deck rail of a party boat and drowned in a navigable lake in Central Florida.

Palmer seems an anomaly in the line of *Moragne* type cases because the movement has been toward uniformity of nonrecovery. *See Miles*, 111 S.Ct. at 326 (restoring uniform rule applicable to all actions for the wrongful death of a seaman, whether under Death on the High Seas Act, the Jones Act, or general maritime law by eliminating loss of society damages). Other courts have found *Palmer* to be a misinterpretation of *Sea-Lan Services, Inc. v. Gaudet*, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974) (allowing widow's claim for loss of society of longshoreman killed on state territorial waters superseded by statute as recognized in *Miles*). In *Truehart v. Blandon*, 672 F. Supp. 929 (E.D.La. 1987), the court denied recovery for loss of society under general admiralty law for death of a twenty-four year old son who was not living with his parents nor contributing to their financial support. It reasoned that Palmer had misread dictum in *Law v. Sea Drilling Corp.*, 523 F.2d 793 (5th Cir.1975), that wrongful death recovery compensates a decedent's dependents and other survivors. However, the Fifth Circuit went on to add that the loss of society belongs to the dependents not to the decedent. *Id.* at 795.

The *Truehart* court stated that *Palmer* had erroneously implied that nonpecuniary damages were the only damages available in a maritime wrongful death action, because even if not entitled to loss of society damages, nondependent survivors could still maintain a wrongful death action for pecuniary damages, such as funeral expenses. *Truehart*, 672 F.Supp. at 933.

members of a drilling vessel damages under general maritime law for loss of society. It reasoned that denying recovery lent more uniformity to admiralty jurisdiction than allowing recovery.

In addition to citing uniformity as compelling denial of recovery, the court in *Truehart v. Blandon*, 672 F.Supp. 929 (E.D.La.1987), refused to find the distinction between cases involving seamen and seaworthiness claims and those that did not relevant in order to craft for nonseamen's survivors a remedy not available to seamen's survivors, to whom admiralty provides a special solicitude. It stated that denying recovery followed the decided wisdom that only dependents should be permitted to recover for loss of society, finding dependency created a finite, determinable class of beneficiaries and the line drawn between dependents and nondependents appeared to be the most rational, efficient and fair way of determining those who may recover for loss of society and those who may not.

In *Anderson v. Whittaker Corp.*, 894 F.2d 804 (6th Cir.1990), boaters drowned when their boat capsized and their surviving families and representatives brought a products liability action against the boat manufacturer in which they alleged that the air scoops located on both sides of the hull at the stern were negligently designed. The manufacturer conceded that the boat was defective and the district court found the plaintiffs had met their burden of proving proximate causation. The trial court found that the nondependent parents could not recover damages for loss of society, relying on the "twin aims" of maritime law as expressed in *Sistrunk*—those of achieving uniformity in the exercise of admiralty jurisdiction and of providing special solicitude to seamen. *Id.* at 811. The Sixth Circuit agreed and affirmed.

Because we agree with the rationale discussed in *Anderson* and *Truehart* and with the decision of Florida's Third District Court of Appeal in applying the *Miles* holding

to nonseamen in *Perlman*, we affirm this point on appeal and find that the trial court did not err in holding nondependent parents cannot recover under general maritime law for loss of society.

GLICKSTEIN, C.J., and STONE and FARMER, JJ., concur.

IN THE
CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA.

GENERAL JURISDICTION DIVISION.

CASE NO. 85-2090 CA(0) A

Fla. Bar No. 065245

MARGARET LIPWORTH, as personal representative of the estate of LORI LIPWORTH, a deceased minor, on behalf of the estate and the survivors of the decedent, to wit: MARGARET LIPWORTH, natural mother and STEPHEN F. LIPWORTH, natural father,

Plaintiff,

vs.

KAWASAKI MOTORS CORP. U.S.A., a foreign corporation, PALM BEACH KAWASAKI, INC., a Florida corporation, and KAWASAKI HEAVY INDUSTRIES, LTD., a foreign corporation,

Defendants.

FINAL JUDGMENT

In accordance with this Court's holdings in its August 23, 1990, "ORDER GRANTING DEFENDANTS' SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE ISSUE OF DAMAGES" and December 5th, 1990, "ORDER REGARDING PLAINTIFF'S AMENDMENT TO THIRD AMENDED COMPLAINT," final judgment should be and the same is hereby rendered in favor of the defendants, KAWASAKI MOTORS CORP., U.S.A., a foreign corporation; PALM BEACH KAWASAKI, INC., a Florida corporation, and KAWASAKI HEAVY INDUSTRIES, LTD., a foreign corporation, and against the plaintiff, MARGARET LIPWORTH, as personal representative of the estate of

LORI LIPWORTH, a deceased minor, said defendants to go hence without day.

The Court reserves jurisdiction to tax costs upon appropriate motions.

DONE AND ORDERED at West Palm Beach, Palm Beach County, Florida, this 5th day of November, 1990.

[ILLEGIBLE]
CIRCUIT COURT JUDGE

Copies to:

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IN THE
CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA.

GENERAL JURISDICTION DIVISION.

CASE NO. 85-2090 CA(0) A

Fla. Bar No. 065245

MARGARET LIPWORTH, as personal representative of the estate of LORI LIPWORTH, a deceased minor, on behalf of the estate and the survivors of the decedent, to wit: MARGARET LIPWORTH, natural mother and STEPHEN F. LIPWORTH, natural father,

Plaintiff,

vs.

KAWASAKI MOTORS CORP. U.S.A., a foreign corporation, PALM BEACH KAWASAKI, INC., a Florida corporation, and KAWASAKI HEAVY INDUSTRIES, LTD., a foreign corporation,

Defendants.

ORDER REGARDING PLAINTIFF'S AMENDMENT TO THIRD AMENDED COMPLAINT

This cause having come on to be heard on plaintiff's motion to file Amendment to Third Amended Complaint, and the Court being advised that the defendants have no objection to the grant of said motion, and the Court being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED:

1. Plaintiff's motion for leave to file Amendment to Third Amended Complaint should be and the same is hereby granted.

2. The plaintiff's Third Amended Complaint shall be deemed amended by the amendment thereto attached to the

subject motion which amends only the ad damnum clause thereof.

3. The defendants' answers to plaintiff's Third Amended Complaint shall stand over and be considered as filed on the date of entry of this order unless defendants desire to answer or otherwise plead to said amendment within 20 days of the date of this order.

4. Over plaintiff's objection this Court's August 23, 1990, "ORDER GRANTING DEFENDANTS' SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE ISSUES OF DAMAGES," a copy of which is attached hereto, is deemed to be fully applicable to plaintiff's Third Amended Complaint and the subject amendment thereto.

5. In accordance with this Court's holding in said August 23, 1990, order, the damages items demanded by plaintiff in her amended ad damnum clauses are hereby stricken and defendants are granted partial summary judgment thereon.

DONE AND ORDERED at West Palm Beach, Palm Beach County, Florida, this 5th day of December, 1990.

Richard B. Burk
CIRCUIT COURT JUDGE

Copies to:

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Supreme Court of Florida

TUESDAY, JUNE 30, 1992

CASE NO. 79,550

District Court of Appeal,
4th District — No. 90-3473

MARGARET LIPWORTH, etc.,

Petitioner,

v.

KAWASAKI MOTORS CORPORATION U.S.A., etc., et al.,

Respondents.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

OVERTON, Acting C.J., McDONALD, GRIMES, KOGAN and HARDING, JJ., concur

A True Copy
TEST

/s/ Sid White
Clerk, Supreme Court

TC

cc: Hon. Marilyn N. Beuttenmuller, Clerk
Hon. Milton T. Bauer, Clerk
Hon. Richard B. Burk, Judge

Edward A. Perse, Esquire
James E. Tribble, Esquire
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Ronald E. D'Anna, Esquire

THE FLORIDA STAR, Appellant,

v.

B.J.F., Appellee.

No. 71615.

Supreme Court of Florida.

Sept. 1, 1988.

Rape victim obtained judgment in the Circuit Court, Duval County, John S. Cox, J., awarding her compensatory and punitive damages against newspaper for publishing her name, and newspaper appealed. The District Court of Appeal, 499 So.2d 883, affirmed, and the Supreme Court summarily denied review, 509 So.2d 1117. Upon seeking further review, the United States Supreme Court, 108 S.Ct. 499, certified question as to state Supreme Court's jurisdiction. The Supreme Court, Barkett, J., held that it had subject matter jurisdiction to hear newspaper's appeal.

Certified question answered in affirmative.

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State Supreme Court had subject matter jurisdiction over appeal of decision of intermediate appellate court expressly citing statute, even though statute was only quoted and was neither discussed nor expressly upheld against appellant's constitutional challenge; Supreme Court's constitutional authority to review any appellate decision establishing point of law only required that there be some statement or citation in opinion that hypothetically could create conflict if there were another opinion reaching contrary result. West's F.S.A. Const. Art. 5, § 3(b)(3).

George K. Rahdert and Bonita M. Riggens of Rahdert, Acosta & Dickson, P.A., St. Petersburg, for appellant.

Joel D. Eaton of Podhurst, Orseck, Parks, Josefsberg, Eaton, Meadow & Olin, P.A., Miami, and Beckham, McAliley & Schulz, P.A., Jacksonville, for appellee.

Alan C. Sundberg of Carlton, Fields, Ward, Emmanuel, Smith, Cutler & Kent, Tallahassee, Gerald B. Cope, Jr. and Laura Besvinick of Greer, Homer, Cope & Bonner, P.A., Miami, Richard J. Ovelmen, General Counsel, The Miami Herald Pub Co., Miami, Paul J. Levine of Spence, Payne, Masington, Grossman & Needle, Miami, Florida; and Sanford L. Bohrer of Thomson, Zeder, Bohrer, Werth & Razook, Miami, Florida, amici curiae for The Miami Herald Pub. Co., The Florida First Amendment Foundation, The Florida Press Ass'n, and The Florida Soc. of Newspaper Editors.

BARKETT, Justice.

This case is before us on the following question of Florida law certified by the United States Supreme Court:

> Whether the Florida Supreme Court had jurisdiction, pursuant to Article V, § 3(b)(3)[1] of the Florida Constitution or otherwise, to hear Appellant's appeal [petition for review] in this cause from the Florida First District Court of Appeal?

The Florida Star v. B.J.F., ___ U.S. ___, 108 S.Ct. 499, 499, 98 L.Ed.2d 498 (1987). We have jurisdiction. Art. V, § 3(b)(6), Fla. Const. As delimited by this opinion, we answer in the affirmative.

The Florida Star, a Jacksonville newspaper, published the name of a rape victim that police erroneously had included in material released to the press pretrial. There is

[1] This section vests the Florida Supreme Court with subject-matter jurisdiction over cases that manifest express and direct conflict with opinions of another district court or of this Court. For convenience, this type of jurisdiction usually is called "conflict jurisdiction."

no dispute that the name should not have been released and that the newspaper itself had a policy against the publication of rape victims' names. Publication appeared to be a criminal violation under section 794.03, Florida Statutes (1985).[2]

B.J.F., the rape victim, brought a civil action premised on a statutory duty arising from section 794.03. The Florida Star moved for dismissal based on the ground that the theory of recovery violated the first and fourteenth amendments. In denying this motion, the trial court ruled that no such violation would occur, and it specifically upheld the constitutionality of section 794.03.

On appeal, the Florida Star again challenged the constitutionality of the statute. The district court affirmed but did not discuss section 794.03 except to quote it verbatim, nor did it expressly uphold the statute against appellant's constitutional challenge.

The Florida Star subsequently filed a jurisdictional brief with this Court, seeking discretionary review. Review summarily was denied. *The Florida Star v. B.J.F.*, 509 So.2d 1117 (Fla.1987).

On August 26, 1987, the Florida Star sought review in the United States Supreme Court. Appellee filed a motion to dismiss on grounds the appeal was untimely. Appellee argued that the Florida Supreme Court lacked jurisdiction to review the case, and that the opinion of the First District thus was the final decision of the highest state court empowered to hear the cause. Under this argument, the

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[2] The statute states:

> No person shall print, publish, or broadcast, or cause or allow to be printed, published, or broadcast, in any instrument of mass communication the name, address, or other identifying fact or information of the victim of any sexual offense within this chapter. An offense under this section shall constitute a misdemeanor of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Florida Star should have appealed to the United States Supreme Court within ninety days of the First District's opinion. The United States Supreme Court then certified the instant question to this Court.

We do not read the question presented by the Supreme Court as a request to explain the internal mechanism of the court or to attempt the impossible task of second-guessing the original panel's decision on jurisdiction. Nor do we believe, as appellee suggests, that the present court should reexamine the question and decide anew whether conflict existed.

Instead, we limit our answer to the context in which the question was posed. For that sole purpose, we answer the question in the affirmative. This Court in the broadest sense has subject-matter jurisdiction under Article V, section 3(b)(3) of the Florida Constitution, over any decision of a district court that expressly addresses a question of law within the four corners of the opinion itself.[3] That is, the opinion must contain a statement or citation effectively establishing a point of law upon which the decision rests. The opinion in *B.J.F.* unquestionably met this requirement.

We premise our holding on our conclusion that Article V, section 3(b)(3) creates and defines two separate concepts. The first is a general grant of discretionary subject-matter jurisdiction, and the second is a constitutional command as

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[3] This Court does not, however, have subject-matter jurisdiction over a district court opinion that fails to expressly address a question of law, such as opinions issued without opinion or citation. Thus, a district court decision rendered without opinion or citation constitutes a decision from the highest state court empowered to hear the cause, and appeal may be taken directly to the United States Supreme Court. Moreover, there can be no actual conflict discernible in an opinion containing only a citation to other case law unless one of the cases cited as controlling authority is pending before this Court, or has been reversed on appeal or review, or receded from by this Court, or unless the citation explicitly notes a contrary holding of another district court or of this Court. *See Jollie v. State*, 405 So.2d 418, 420 (Fla.1981).

to how the discretion itself may be exercised. In effect, the second is a limiting principle dictated to this Court by the people of Florida. While our subject-matter jurisdiction in conflict cases necessarily is very broad, our discretion to exercise it is more narrowly circumscribed by what the people have commanded:

> (b) JURISDICTION.—The supreme court:
>
> . . . .
>
> (3) May review any decision of a district court of appeal . . . that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

Art. V, § 3(b)(3), Fla. Const.

Thus, it is not necessary that conflict actually exist for this Court to possess subject-matter jurisdiction, only that there be some statement or citation in the opinion that hypothetically could create conflict if there were another opinion reaching a contrary result. This is the only reasonable interpretation of this constitutional provision. As the final authority on the meaning of the Florida Constitution, *see* Art. IV, § 1(c), and Art. V, § 3(b)(1), (3), Fla. Const., this Court has the final and inherent power to determine what constitutes express and direct conflict. No other authority exists, except the people pursuant to their power to amend the constitution, that may nullify this Court's pronouncements on that question.

This, by definition, is discretion, not jurisdiction. As noted in Black's Law Dictionary 419 (5th ed. 1979), discretion is

> the exercise of judicial judgment, based on facts and guided by law. . . . It is a legal discretion to be exercised in discerning the course prescribed by law and is not to give effect to the will of the judge, but to that of the law.

Subject-matter jurisdiction, on the other hand, is defined as:

> Power of a particular court to hear the type of case that is then before it. . . . jurisdiction over the nature of the cause of action and relief sought. . . .

Id. at 767. While this Court has subject-matter jurisdiction to hear any petition arising from an opinion that establishes a point of law, we have operated within the intent of the constitution's framers, as we perceive it, in refusing to exercise our discretion where the opinion below establishes no point of law contrary to a decision of this Court or another district court.

We thus conclude that we had complete subject-matter jurisdiction to hear *B.J.F.* and decide the case on its merits with finality. This jurisdiction must be regarded as complete until the time the petition for review was denied. Moreover, the denial of review in *B.J.F.* did not operate to deprive this Court of its subject-matter jurisdiction retroactively, but merely constituted the point in time at which jurisdiction, for whatever reason, had ended.

We confess that we are much influenced in this holding by the procedural quagmire that would result from a negative answer. To seek review of a state court judgment in the United States Supreme Court, a litigant first must exhaust all avenues of review available in the courts of the state. The fact that review in the highest court is discretionary is irrelevant; the litigant still must seek such review in order to proceed to the United States Supreme Court. *American Ry. Express v. Levee,* 263 U.S. 19, 20–21, 44 S.Ct. 11, 12–13, 68 L.Ed. 140 (1923); *Stratton v. Stratton,* 239 U.S. 55, 56–57, 36 S.Ct. 26, 27, 60 L.Ed. 142 (1915).

It is therefore essential to the preservation of a litigant's right to United States Supreme Court review that he or she know with certainty the avenues of appellate review required by the courts of the state. If, after the fact, we held in a case such as this that there was no jurisdiction, litigants would be

placed in a needlessly burdensome position. A party would have to try to predict which court ultimately would recognize jurisdiction in the case and file a petition for review accordingly. A party who files only in the United States Supreme Court, however, would risk the objection that he or she has not exhausted state court remedies. On the other hand, a party who files only in the Florida Supreme Court and is denied review, would risk the objection made by B.J.F. here that the later appeal to the United States Supreme Court is untimely.

Alternatively, a party could file a petition for review in *both* the Florida Supreme Court and the United States Supreme Court simultaneously, simply to protect his or her rights. This solution would entail double work, separate briefs, and much more expense for the clients. Moreover, a stay would likely need to be sought in the United States Supreme Court because the appeal in *that* Court would not be ripe for review unless and until *this* Court denied review or otherwise disposed of the case. The situation is further aggravated by the fact that, on some occasions, this Court agrees to review a case on the merits, but after briefing or argument determines that review was improvidently granted.

No purpose is served by this duplication of effort, added expense and uncertainty. We do not believe the people intended such a result when they amended the constitution in 1980.

For the foregoing reasons, we answer the certified question in the affirmative. This opinion shall be transmitted forthwith to the United States Supreme Court.

It is so ordered.

EHRLISH, C.J., and OVERTON, McDONALD, SHAW, GRIMES and KOGAN, JJ., concur.